

Sir John Schaw of Greenock, Bart. - - Appellant.

Dame Margaret Schaw, Widow of Sir John
Houstoun, Baronet - - - Respondent.

The Respondent's CASE.

April, 1677.

BY Contract of Marriage between *Sir John Schaw* and *Dame Helenor Nicolson* (late Father and Mother of the Appellant and Respondent) in Consideration of her Portion, which was very considerable, the Lands of *Greenock* were settled upon the said *Dame Helenor* for her Life, for her Jointure; and she was likewise provided to one third of all the Real Estate, which her Husband should acquire during the Coverture; and one third of all the Household Furniture.

Afterwards one third Part of the Estate of *Carnock* and *Plain*, in the Sheriffdom of *Stirling*, did descend to the said *Dame Helenor*, as one of the Three joint Heiresses of the Lord *Napier*, her Brother's Son, the whole being 833 l. 6 s. 8 d. Sterling per Annum.

Sept. 8. 1690.

Dame Helenor, with the Consent of her Husband, made a Deed of Conveyance to one *Patrick Houstoun* and his Heirs, of the Reversion after her Decease, of her third Part of the said Estate of *Carnock* and *Plain*, and also of her Third of any other Lands or Annual Rents in the Sheriffdom of *Stirling*, late belonging to Lord *Napier*, or to any of her Ancestors, to which she might succeed as Heir Portioner, reserving to herself the said Estate and Rents for her Life.

What Considerations, or what Trusts or Powers were express'd in this Deed, cannot be seen, for the intire Deed has never appeared since it was sign'd; but only a torn Part of it produced by the Appellant after his Father's Death, and 23 Years after the Date — Nor was it ever judicially Ratified (*i. e.*) *Dame Helenor* did not appear before a Judge, and make Oath (apart from her Husband) that the Deed was agreed to, and executed by her, voluntarily, which is absolutely necessary by the Law of *Scotland*, to give Force to any Deed made by a Feme-Covert: — Nor was it ever Registred; nor is it therein mentioned, That any Title-Deeds were delivered, or any Schedule made of them, all which is constantly done in the Case of real Purchasors — Nor had *Sir John*, or *Dame Helenor* any Occasion to sell the Reversion of this Estate, or if they had, it was notorious, that the said *Patrick Houstoun* was not able to purchase it — But there is no Doubt, this Deed was intended by *Dame Helenor* for the Benefit of *Sir John Schaw* her Husband, and the Name of *Patrick Houstoun* was only made use of in this Deed, as a Trustee for him: And accordingly,

September 19.
1690.

By Deed dated 11 Days afterwards, the said *Patrick Houstoun* made over the same Premises to *Sir John Schaw* and his Heirs, without any Consideration express'd, more than the general Words, *For divers good Causes and valuable Considerations.*

That both *Sir John Schaw* and *Dame Helenor*, look'd upon these Deeds to be of no Effect Ten Years afterwards, is manifest from the following Transaction between them, *viz.*

Soon after the Marriage of the Appellant with *Margaret*, the Daughter of *Sir Hugh Dalrymple*, Lord President of the Session in *Scotland* (which was in *March* 1700) It was agreed between the said *Sir John Schaw* the Father, and the said *Dame Helenor* his Wife, That she should Release her Right to the Household Furniture, and the acquir'd Estate, and other Provisions made in her Favours, by her said Marriage Articles; and that she should also make a Settlement of her Estates of *Carnock* and *Plain* to herself for Life, with Remainder to the Appellant her Son, in Fee, subject to a Power to the said *Dame Helenor*, to charge the same with any Sum, not exceeding 50,000 Marks, *Scots* (which is 2777 l. 15 s. 6 d. $\frac{2}{3}$ Sterling) and that in Consideration thereof, *Sir John* her Husband, should oblige himself and his Heirs, to pay her an Annuity of 8,000 Marks (which is 444 l. 8 s. 10 d. $\frac{2}{3}$ Sterling) so long as she continued his Widow — And in pursuance of the said Agreement,

August 19,
1700.

The said *Dame Helenor*, by Deed, reciting the said Agreement, did Release all the Provisions made for her by her Marriage Articles — And by another Deed of the same Date, did, as then *Heritable Proprietrix* of her said Estate of *Carnock* and *Plain*, settle the same accordingly, with the Approbation and Consent of the said *Sir John Schaw* her Husband, testified by his executing the same Deed.

Same Date.

And in Consideration thereof, *Sir John* her Husband, by his Deed or Contract, to which the Appellant subscrib'd his Consent (reciting the said Settlement and Release) obliged himself

himself and his Heirs, to pay her an Annuity of 8,000 Marks *Scots*, so long as she continued his Widow, to both which Deeds the Lord President was a Witness.

Nelther of these Two Deeds mention one Word of the Conveyances in 1690, which makes it more than probable, that upon the making of these Deeds, the former Deed from Dame *Helenor* to *Patrick Houstoun*, was cancelled or torn (if it had not been done before) in such a Manner, as both Sir *John* and Dame *Helenor* esteem'd the Deed from her to *Patrick Houstoun*, and from him to Sir *John*, to be then of no Effect.

1702. Sir *John Schaw* died, and Dame *Helenor* continued a Widow all the rest of her Life; but the Respondent her Son, never thought fit to pay her any Part of the Annuity of 8,000 Marks.

1709. This obliged her, though unwillingly, to commence a Suit before the Lords of Session against him, for Payment of the Arrears of that Annuity, and that he might be decreed to pay the same in Time coming.

The Appellant thereupon brought his Action of Reduction, and insisted, That the Deed enter'd into by his Father, for Payment of that Annuity, appear'd to be in Consideration of the said Dame *Helenor*'s making a Settlement of her Estate of *Carnock* and *Plain*; but that such Settlement was not found amongst his Father's Papers at his Death; nor did it appear to have been ever executed, at least not Ratified by her before a Judge (as was necessary in all Conveyances made by a married Woman) nor was the same delivered by her, and must be PRESUM'D to remain in her Hands cancell'd, and therefore the Deed for Payment of the Annuity, must be consider'd as a mutual Contract, and she not having perform'd her Part, the said Deed was void, as being without any Consideration.

Dame *Helenor*, on the other hand insisted, That she had not cancelled the Settlement of her Estate, and that she was still willing to renew the Conveyance in the same Terms it was first granted in Favours of the Appellant.

5 July 1711. But the Lords of Session, by their Interloquitory, found, that the said Dame *Helenor*, having the Disposition cancelled in her Hands, and never Ratifying it judicially, presum'd in Law, that it was cancell'd by herself, and therefore that the Obligements on Sir *John*, by the Contract, were dissolv'd.

Against this Decree, the said Dame *Helenor*, according to the Method then used in *Scotland*, enter'd her Protest for Remedy of Law, to her then Majesty and Parliament.

6 Sept. 1711. By Deed, reciting the Contract for the said Annuity, and the said Suit, Decree and Protest, the said Dame *Helenor* assign'd all her Right to the Arrears and future Payments of the said Annuity of 8,000 Marks to the Respondent, in Case the said Interloquitory should be Reversed, upon an Appeal she intended to bring upon her Protest: But in Case the said Interloquitory should be Affirm'd, Then she dispos'd her own Estate of *Carnock* and *Plain* to the Respondent; and in March 1722, a little before her Death, the said Dame *Helenor* confirm'd these Deeds to the Respondent her Daughter.

May 1713. The Appellant now made Use of the torn Conveyance from Dame *Helenor* to *Patrick Houstoun*, and the Assignment from him to the Appellant's Father in 1690, and took Feofment upon it, according to the Forms used in *Scotland*, thereby pretending to make up a Right to the said Dame *Helenor*'s Estate of *Carnock* and *Plain*, although he had but lately obtain'd the aforesaid Decree, to discharge him from paying her said Annuity, because she had not convey'd away her said Estate.

June 1713. This obliged Dame *Helenor* to bring her Suit of Reduction before the Court of Session for setting aside that pretended Right claimed under *Patrick Houstoun* — Pending which Suit she died.

1722. Soon after Dame *Helenor*'s Death, the Appellant, as her Son and Heir, brought his Action of Reduction and Declarator for avoiding her said Settlements in September 1711 and in March 1722, in Favours of the Respondent, on Pretence that she had unduly meddled with her Mother's Writings, and thereby had forfeited her Right to her Mother's Estate — And in the same Action he insisted upon the said Conveyances to and from *Patrick Houstoun*, as giving the Appellant a Right to the Estate of *Carnock* and *Plain*.

20 July 1725. But the Court of Session found the Deeds in Favours of the Respondent, to be valid.

April 1726. The Appellant brought his Appeal before the Honourable House of Lords against the Interloquitory of the 20th of July 1725 — And thereupon, that she might be at a Certainty whether she was to have the Arrears of her Mother's Annuity, or her Estate of *Carnock* and *Plain*, the Respondent brought her Appeal against the Interloquitor of the 19th of July 1711, whereby Dame *Helenor* was debarred from the said Annuity, as not having conveyed her Estate of *Carnock* and *Plain* — But the Lords dismissed both Appeals, and AFFIRMED both Interloquitors.

1726. After this the Respondent brought her Counter-Action of Reduction and Declarator, to have the said Conveyance from Dame *Helenor* her Mother, to *Patrick Houstoun*, set aside — And to be acquitted from the Appellant's Action, whereby he insisted, That the Conveyance to *Patrick Houstoun* gave him a Right to his Mother's Estate.

14 July 1726. The Court of Session unanimously FOUND — “ That the Dispositions by the said Dame *Helenor* of the Third of the Lands of *Carnock* and *Plain*, with the House and Yards, in Favours of *Patrick Houstoun*, was a Trust in the Person of the said *Patrick Houstoun*, for the Behoof of Sir *John Schaw* her Husband, and so revokable and revoked by the Disposition of the same subject by her, in Favours of her Daughter the Lady *Houstoun*, “ and

"and therefore assailed her the Lady *Houstoun* from the Reason of Reduction of her Right founded on the said Disposition to *Patrick Houstoun*, and Conveyance thereof in Favours of Sir *John Schaw*, Elder ——— And also decern'd in the Lady *Houstoun's* Reduction of the said two Dispositions, and declar'd her Right of Property to the House and Yards, and Third of the Lands of *Carnock* and *Plain*."

The Appellant hath now brought his Appeal against this Decree, but the Respondent hopes the same shall be Affirmed, for the following REASONS.

- I. The Deed from Dame *Helenor* to *Patrick Houstoun*, was never ratified, as was necessary to make a Deed effectual from a married Woman, and consequently it was revokable at her Pleasure, and was revoked by her Deeds of 1711, and 1722, in Favour of the Respondent ——— And her conveying not only that Estate, but all other Estates that should descend to her, and reserving the Life-Rent to herself, not only of the Premises conveyed, but of those that should descend, shews that *Patrick Houstoun* was not a real Purchaser.
- II. No Enfeoffment was taken upon either of the Deeds, nor was any Notice taken of them during the Life-time of Sir *John Schaw*, who lived twenty-two Years after the Date, which shews that both he and Dame *Helenor* look'd upon them as of no Effect ——— Nor were they ever recorded, which a real Purchaser would not have neglected. *Twelve*
- III. There is no mention in either of the Deeds of any Consideration paid ——— Nor of any Title Deeds delivered, or Schedule made of them, as is always done in Deeds of Purchase ——— But it appears by those Deeds, that they were both written by *William Ewen*, Writer in *Edinburgh* ——— And were afterwards filled up and attested by *William Mac Inturnor*, Writer in *Greenock* (which is 50 Miles from *Edinburgh*) who inserted the Dates, and his own, and the rest of the Witnesses Names ——— And it plainly appears, that blank Spaces were at first left in every Place in both Deeds for the Name of the Grantee in the former, and the Grantor in the latter; and that those Blanks were filled up with the Name of *Patrick Houstoun* by the same Hand that wrote the Dates and Witnesses Names, who was Sir *John Schaw's* Clerk.
- IV. That Sir *John* the Husband *Anno* 1700, admitted the Fee of this Estate to be then in the Person of Dame *Helenor* his Wife, and concurred with her as *heretable Proprietrix thereof*, in settling the same upon the Appellant, with a Power in her solely to charge the said Estate with 50,000 Marks, which she could not have had if the Deed to *Patrick Houstoun* had been in force; but it is certain that Deed was cancelled when the Deed of 1700 was made.
- V. That in the Suit brought against the Appellant by his Mother, for the Arrears of her Annuity, the Appellant pretended no Right to the Property of her Estate; but, on the contrary, pleaded it as a Reason against the Annuity, that by cancelling the Deed in 1700, she had reserved the Property of the Estate to herself, which was the Foundation of the Decree of the Lords of Session, and Affirmance thereof by the House of Lords.
- VI. But, lastly, the Deed itself, when produced in the only Shape it has hitherto appeared, will shew it to be cancelled, which is a sufficient Revocation, for there is only the latter Part containing the executive Clauses; but the first Part, wherein the Recitals, Trusts, or Powers were expressed, is torn off.

Object. I. That the Deed from *Patrick Houstoun* bears to be for *valuable Consideration*.

Answer. That is common in all Trust-Rights to make the Recital for a valuable Consideration in general; but in a Deed of real Sale, the Sum of Money is always expressed.

Object. II. That although the Circumstances afforded a strong Suspicion that the Deed to *Patrick Houstoun* was a Trust for Sir *John* the Husband's Behoof, yet they did not amount to a sufficient legal Evidence.

Answer. That a Trust not appearing cannot be proved any other way than by Circumstances, and these before mentioned are, in this Case, convincing ——— Besides the subsequent Deeds in 1700, which leave no Room for Doubt.

For these, and other Reasons, the Respondent humbly hopes that the Decree shall be Affirmed, and the Appeal dismissed with Costs.

P. YORKE.

WILL. HAMILTON.

The Appellant has now brought his appeal against the decision of the two Tribunals and decided that he will appeal to the House of Lords. He has now brought his appeal against the decision of the two Tribunals and decided that he will appeal to the House of Lords.

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10. Entomologist was taken from the side of the Dead, and was found during the following day, who had been taken from the side of the Dead, which shows that both he and James Nelson looked upon them as not being for were they ever recorded, which a real Pariah would not have neglected.

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The Hon^{ble} Lady Howard

1720. **Independent?** **the Bar**

Rej. 1

Honorable Day of

1000, which have no room for a word.

For the use of the President, the Editor of the Washington Post, and the Editor of the New York Times.